use of unbundled elements. Falcone/Turner ¶¶ 26-37. SBC's design services requirement alone thus provides overwhelming evidence of SBC's failure to meet its checklist obligations.

2. Licensing. Another extraordinary obstacle that SBC has placed in the path of CLECs seeking to use unbundled elements is SBC's licensing requirement. SBC's SGAT makes it the "sole obligation of the [CLEC] to obtain any . . . licenses under intellectual property" from SBC's numerous vendors. SGAT, Section XV, ¶ 6. In Texas, SBC has now made its position clear that no CLEC may obtain any network element until first obtaining its own such license from each one of SBC's separate vendors of equipment and software. At the same time, SBC has refused AT&T's request to provide it with copies of the relevant contracts so as to enable AT&T to assess whether and to what extent any licenses are necessary. Pelto Aff. ¶¶ 6-12. SBC has engaged in this conduct while it simultaneously and correctly told the Eighth Circuit that these licensing restrictions violate the Commission's rules implementing Section 251.[11]

Indeed, SBC unsuccessfully urged that the Commission approve its use of these very same licensing restrictions in the recent proceeding on infrastructure sharing under Section 259. The Commission, however, held that SBC cannot "evade" its sharing obligations under Section 259 by claiming that its agreements with third parties preclude granting other carriers access to its facilities, but instead is "required to secure" any necessary licensing "by negotiating with the relevant third party directly" -- precisely the obligation SBC's SGAT and interconnection

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[11] Iowa Utils. Bd. v. FCC, Nos. 96-3321 et al., Brief for Petitioners Regional Bell Cos. and GTE (8th Cir.) (filed Nov. 18, 1996) at 62-63 ("RBOC 8th Cir. Br."); Reply Br. at 42.

agreements unlawfully refuse to implement. See Pelto Aff. ¶¶ 18-22 (citing Infrastructure Sharing Order, CC Docket No. 96-237 (released February 7, 1997)).

SBC's refusal to secure any necessary license modifications on its own (and its failure to spread the costs among all carriers, including itself) is blatantly discriminatory and an illegal entry barrier. CLECs will face substantial burdens in time and money trying to contact and negotiate with the vendors. This process alone could delay UNE-based entry by months, if not longer. Moreover, in addition to the substantial transaction costs that SBC's position imposes on CLECS, the position all but assures that CLECs will be required to incur substantially higher costs than SBC for equivalent licenses. Although SBC itself had a choice between vendors at the time it procured its equipment, CLECs would be required, under SBC's approach, to obtain licenses from each of those specific vendors, who have no incentive to offer licenses at reasonable prices. See Pelto Aff. ¶¶ 19-24. And any license fees paid by CLECs to third parties apparently will be in addition to costs for intellectual property that are reflected in SBC's UNE prices.

3. Restrictions on Unbundled Switching. SBC not only is not providing the unbundled switching element to any competing carrier today, but also is refusing even to offer unbundled switching on the nondiscriminatory terms the Act requires. In its SGAT and in its agreements and negotiations, SBC insists on restricting competitors' ability to offer a full range of telecommunications services and to use all the features and functionality of the switch.

First, SBC refuses to permit competitors to use the unbundled switch to provide originating or terminating access for 800 service, terminating exchange access, or intraLATA

toll service.[12] Falcone/Turner Aff. ¶¶ __-__. SBC's position is flatly inconsistent with the Act and the Commission's Orders. It is clear that CLECs are permitted to use network elements to provide any telecommunications service. See Local Competition Order ¶¶ 292, 342, 356; 47 C.F.R. § 51.307(c); Order on Reconsideration ¶ 11 Docket 96-98 (rel. Sept. 27, 1996) ("a carrier that purchases the unbundled local switching element to serve an end user effectively obtains the exclusive right to provide all features, functions, and capabilities of the switch, including switching for exchange access and local exchange service for that end user")(emphasis added). Indeed, the Commission specifically confirmed that "new entrants may assess exchange access charges to IXCs originating or terminating toll calls on those [unbundled network] elements." Local Competition Order ¶ 363 n.772.[13]

Second, SBC has not yet made available one of the essential "capabilities" of the switch -- customized routing. Id. ¶ 412; see id. ¶¶ 418, 536 (requiring customized routing, where feasible, to a competitor's operator services and directory assistance platform). Customized routing is particularly important to AT&T, because combining unbundled network elements with AT&T's operator services is central to AT&T's plan to offer consumers a distinctive, high-quality, competitive local service. Falcone/Turner Aff. ¶ 18. SBC's SGAT

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[12] Indeed, SBC may be unable to provide CLECs with the data necessary to bill for terminating access before January 1988. Falcone/Turner ¶ 52.

[13] This rule (47 C.F.R. § 51.515) was temporarily stayed by the Eighth Circuit on jurisdictional grounds. But that stay only relieves states of the duty to follow FCC rules in § 252 arbitrations and has no effect on the Commission's duty to follow its interpretations of § 251 in proceedings under § 271 -- as SBC correctly told the Eighth Circuit. RBOC 8th Cir. Br. 31. Beyond that, SGAT also applies to interstate access revenues over which this Commission's jurisdiction is unquestioned.

contains no pricing term whatsoever for customized routing. Id. ¶ 47. In SBC's agreement with Sprint, and in negotiations with AT&T, SBC has refused to commit either to prices for customized routing or to a schedule for implementation. Id. ¶¶ 45-46. Moreover, SBC has further refused to identify any price for DS1 trunk ports, which are essential to customized routing as well as other services. Id. ¶¶ 49-50. Customized routing is thus plainly not available today in Oklahoma.

4. Restrictions on Unbundled Loops and Transport. As with unbundled switching, SBC is neither providing any competitors with unbundled loops nor offering them on nondiscriminatory terms. For example, SBC refuses to offer competitors nondiscriminatory access to those loops that are behind Integrated Digital Loop Carrier (IDLC) (id. ¶¶ 55-60), despite the Commission's clear requirement that it do so. Local Competition Order ¶¶ 382, 384. Moreover, SBC insists on imposing discriminatory timetables for provisioning unbundled loops that would give SBC undue discretion to manage and delay their competitors' growth. Falcone/Turner Aff. ¶ 61-63.

Similarly, SBC has refused to provide nondiscriminatory access to the multiplexing capability that is crucial to interconnecting unbundled local loops with dedicated transport. Id. ¶¶ 64-70. This also violates SBC's statutory obligations under Section 251(c)(3) (see Local Competition Order ¶¶ 440, 444), and further underscores how far SBC is today from making unbundled network elements available on nondiscriminatory terms.

B. SBC Is Neither Providing Nor Offering Access and Interconnection At Cost-Based Rates In Accordance With Sections 251 and 252.

SBC also is neither providing nor even offering "[i]nterconnection" and "nondiscriminatory access to network elements" at just and reasonable rates based on forward-

looking costs, as required by Sections 251(c)(2), (c)(3), 252(d)(1), and (d)(2). See Rhinehart Aff. ¶¶ 10-12. In its Local Competition Order, the Commission recognized that prices "are critical terms and conditions of any interconnection agreement." Order ¶ 618. If prices for interconnection and unbundled elements reflect their forward-looking cost, then the Act should operate "to ensure that opportunities to compete are available to new entrants." Id. ¶ 114. If incumbent LECs are able to charge supracompetitive prices, however, they will be able "to inhibit or delay the interconnection efforts of new competitors" and "hinder the development of local competition." Id.

The burden of proving that SBC's rates for interconnection and unbundled elements meets the statutory requirements is on SBC. The Commission's Order is unequivocal on this point. Local Competition Order ¶ 680. SBC has wholly failed to sustain its burden.

SBC's application rests solely upon a conclusory affidavit, unencumbered by any supporting evidence, in which SBC merely asserts that valid cost studies support its rates. This bare assertion of compliance is patently inadequate to satisfy SBC's burden of proof. See Rhinehart Aff. ¶¶ 19-23. Moreover, it is demonstrably false and impossible to reconcile with the fact that SBC's rates are typically much higher than the Commission's proxy ceilings. Id. ¶¶ 34-51, 53.

Nor can SBC point to any state decision that its proffered rates comply with the Act's requirements. Many of the rates in SBC's SGAT, for example, are the same as those adopted by the Arbitrator in the AT&T/SBC arbitration. Yet the Arbitrator expressly disavowed making any finding that these rates were cost-based, much less just and reasonable. Id. ¶ 17. The Oklahoma Commission then adopted the Arbitrator's report with respect to pricing issues, and

noted the need for a hearing on whether the rates were cost-based. Id. ¶ 18. Neither an arbitrator nor the State Commission has yet found that SBC's rates comply with these critical statutory requirements.

C. SBC Is Neither Providing Nor Offering Nondiscriminatory Access To Its Operations Support Systems.

Even if SBC were willing to provide everything else that the Act requires on fair and nondiscriminatory terms, the simple fact would remain that AT&T and other CLECs still lack the ability to order and provision services for customers though electronic interfaces with SBC's operations support systems ("OSS"). The importance of scrutinizing the extent to which CLECs are provided nondiscriminatory access to SBC's operations support systems cannot be overstated. As the Commission found in the Local Competition Order, "it is absolutely necessary for competitive carriers to have access to operations support systems functions in order to successfully enter the local service market." Order ¶ 521 (emphasis added).[14] And under Section 251(c)(3), an incumbent LEC must provide competitive carriers with electronic access to the incumbent's OSS that is at least "the same" as or "equal to" what it provides to itself. Order ¶¶ 518, 519, 523; see Pfau Aff. ¶ 10. Accordingly, the Commission ordered incumbent LECs to provide nondiscriminatory access by January 1, 1997. Order ¶¶ 316, 516-17, 525.

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[14] See also id. ¶ 522 ("operations support systems functions are essential to the ability of competitors to provide services in a fully competitive local service market"); id. ¶ 518 ("if competing carriers are unable to perform the functions of pre-ordering, ordering, provisioning, maintenance and repair, and billing for network elements and resale services in substantially the same time and manner that an incumbent can for itself, competing carriers will be severely disadvantaged, if not precluded altogether, from fairly competing") (emphases added).

In its Second Order on Reconsideration, the Commission clarified that it would not take enforcement action against a non-complying LEC if, by January 1, 1997, the LEC had "establish[ed] and ma[de] known to requesting carriers the interface design specifications that the incumbent LEC will use to provide access to OSS functions." Second Order on Recons. ¶ 8 (CC Docket No. 96-98 (released Dec. 13, 1996)). The Commission reaffirmed, however, (1) that incumbent LECs must provide access to operations support systems on terms and conditions "equal to the terms and conditions on which an incumbent LEC provisions such elements to itself or its customers" (id. ¶ 9); (2) that the "actual provision" of such access "must be governed by an implementation schedule" (id. ¶ 8); and (3) that "incumbent LECs that do not provide access to OSS functions, in accordance with the *First Report and Order*, are not in full compliance with section 251." Id. ¶ 11 & n.32 (citing § 271(c)(2)(B)).

Given that SBC's implementation schedule extends far beyond this spring, the notion that SBC can claim today to have met its OSS obligations is absurd on its face. See Dalton Aff. ¶¶ 38, 51 & n.21, 64. Indeed, there are three fundamental deficiencies in SBC's OSS compliance to date.

1. **UNE-Platform.** First, by not yet providing AT&T with specifications for ordering combinations of unbundled elements, SBC has not complied even with the Commission's interim requirement that SBC "establish and make known" all interface specifications by January 1, 1997. Indeed, to achieve the kind of cooperative interconnection contemplated by the Act, it is inconceivable that an incumbent could provide even specifications without first discussing interface issues with all interested CLECs. Yet, despite repeated requests from AT&T beginning in June, 1996, and despite arbitration decisions in five states

(including Oklahoma), SBC has resisted making serious efforts to develop, let alone test, electronic interfaces for serving customers via the platform and other combinations of unbundled elements. Falcone/Turner Aff. ¶ 10; Dalton Aff. ¶¶ 38-43. SBC was willing to address only a limited form of the platform in negotiations (id. ¶¶ 40-42) and its conduct since then has fallen equally short of providing nondiscriminatory OSS access for ordering and provisioning UNEs.

2. Resale. Second, SBC has not shown and cannot show that its interfaces for resale are operationally ready. This is a stark failure, for SBC's resistance to competition via unbundled network elements has required AT&T to focus its initial market entry efforts on resale. Here, too, there have been delays. For example, it is increasingly clear that SBC will not meet the key target dates set forth in the implementation schedule for OSS interfaces adopted by the Oklahoma commission in the SBC-AT&T arbitration.[15] Nevertheless, AT&T expects to begin testing SBC's Datagate and EDI interfaces for pre-ordering and ordering, respectively, in Texas on May 20, 1997, and hopes to complete testing by August. Dalton Aff. ¶¶ 51 & n.21, 64.

Experience suggests, however, that the actual time that will be needed to get these interfaces operationally ready is uncertain. For example, SBC's merger partner, Pacific Telesis, led AT&T to believe months ago that its electronic interfaces were operationally ready and able to handle competitively significant volumes of orders on a nondiscriminatory basis. This proved to be untrue: Without first advising AT&T, Pacific Telesis resorted to manual processing of AT&T's orders. The backlog of pending AT&T orders eventually became so great that AT&T

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[15] Application of AT&T, No. PUD 960000218, Report and Recommendations pp. 6-7 (Nov. 13, 1996) and Order p. 4 (December 12, 1996); Dalton Aff. ¶¶ 51 & n.21, 64.

was compelled significantly to curtail its marketing efforts in California. Dalton Aff. ¶ 63. AT&T's experience with Pacific Telesis underscores that a BOC's mere assertion that its electronic interfaces will provide nondiscriminatory access cannot be accepted until experience proves that the assertion is true.

To accelerate market entry in Oklahoma, AT&T recently decided to test SBC's proprietary Consumer Easy Access Sales Environment ("C-EASE") system for pre-ordering, ordering, and provisioning resale service to residential customers. Even if the testing confirms that C-EASE works as promised, however, C-EASE is not an adequate substitute for the electronic interfaces with SBC's OSS that the Act requires. It is at best an interim solution that may enable AT&T to enter the residential market in a limited way before the Datagate and EDI interfaces are ready.

The limitations of C-EASE are inherent in its nature. C-EASE is not an interface that allows AT&T's systems to communicate with SBC's systems. Rather, C-EASE requires an AT&T service representative to act as an interface between the two systems, entering customer information first into the SBC system, and second into the AT&T system. This duplication of effort increases not only the time and cost of customer service but also the risk of error. Dalton Aff. ¶¶ 47-50, 53-60. Even for simple residential orders, C-EASE will not provide AT&T with access to SBC's OSS on terms and conditions "equal to the terms and conditions on which [SBC] provisions such elements to itself or its customers." Second Order on Recon. ¶ 9.

Moreover, C-EASE is limited to simple residential resale orders. It cannot be used to order unbundled network elements. Dalton Aff. ¶ 47. Even for resale, it cannot be used to submit supplemental orders, nor can it be used for "partial migrations," where a customer seeks

to move only some of its lines to a different carrier. Id. ¶ 54 & n.23. And SBC's counterpart system for business orders ("B-EASE"), which uses a different operating system, is so limited in its capabilities as to be unworkable even as an interim, stop-gap measure. Id. ¶¶ 50, 57-59. SBC's other resale interfaces (for repair, maintenance, and billing) also are not operationally ready. Id. ¶¶ 71-76.

3. **Nondiscriminatory Performance.** But even if all of SBC's electronic OSS interfaces were operationally ready, that alone would not demonstrate that SBC was providing AT&T and other CLECs with "nondiscriminatory access" as required by Section 251(c)(3). To make that showing, SBC must commit to a set of performance measures and produce data that demonstrate that the OSS access that CLECs are receiving is in fact equivalent in terms of availability, timeliness, accuracy, and completeness to the OSS access that SBC provides to its own customer representatives. Pfau Aff. ¶ 7.

Of course, SBC cannot begin to make the required showing at this time because no carrier is yet even being provided with electronic access. But SBC has refused even to commit to a meaningful measurement plan. Such a plan is essential to permit an objective and verifiable assessment in the future of any claim that SBC is providing CLECs with nondiscriminatory access. Id. ¶¶ 11-12.[16]

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[16] The general service quality objectives set by the Oklahoma Corporation Commission are no substitute for a measurement plan, because those objectives address only a limited range of services and establish outer limits on performance to avoid sanctions. Pfau Aff. ¶ 15. They do not provide the basis for the comparison that Section 251(c)(3) and the Commission's Local Competition Order requires, which is whether CLECs are receiving access that is at least "'the same'" as, or "'equal to,'" the OSS access that SBC provides to its own customer representatives. Id. ¶ 10 (citations omitted).

D. SBC Is Not Providing Or Offering Unrestricted Resale.

SBC also has not made its telecommunications services "available for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3)." § 271(c)(2)(B)(xiv). First, SWBT has included provisions in each interconnection agreement and in its SGAT that unreasonably restrict resale in violation of Section 251(c)(4) of the Act and the Commission's Rules. Gaddy Aff. ¶¶ 7-13. Second, SWBT's refusal to make promotions of ninety (90) days or less available for resale at all -- even at the retail rate -- is an outright prohibition on the resale of a telecommunications service, in violation of subsections 251(b)(2) and (c)(4)(B) of the Act. Id. ¶¶ 14-17. Finally, through its agreements and SGAT, SWBT imposes service connection and other charges that violate the provisions of the Act regarding the prices of services offered at wholesale. Id. ¶¶ 18-20.

E. SBC Is Not Providing Or Offering Interim Number Portability.

Under Sections 251(b)(2), 271(c)(2)(B)(xi), 271(d)(3)(A)(i) and this Commission's rules, SBC must fully implement interim local number portability using "Remote Call Forwarding ("RCF"), Flexible Direct Inward Dialing ("DID"), or any other comparable and technically feasible method as soon as reasonably possible upon receipt of a specific request." 47 C.F.R. Section 52.27; see also Number Portability Order, 11 FCC Rcd at 8352, 8409 (¶¶ 6, 110). Further, "when a number portability method that better satisfies the requirements of section 251(b)(2) than currently available measures becomes technically feasible, [SBC and other LECs] must provide number portability by means of such method." Id. at 8412 (¶ 115).

To begin with, the fact that Brooks Fiber "has experienced problems with every one of the[] customer conversions" that SBC has performed demonstrates that SBC has not fully

implemented even RCF. Initial Comments of Brooks Fiber at 4. More important still, SBC has steadfastly refused to make available Route Indexing-Portability Hub ("RIPH"), an interim number portability method that is comparable to RCF and DID, technically feasible, and competitively crucial. Lancaster Aff. ¶¶ 18-47. This refusal significantly undercuts the ability of AT&T and other CLECs to compete with SBC for business customers. Id. ¶¶ 18-19. The Oklahoma Commission erred in failing to order SBC to provide RIPH in the arbitration proceeding between AT&T and SBC, and AT&T has sued SBC and the Texas commission over this issue in Texas. Id. ¶ 42 n.15. In contrast, BOCs and other ILECs have agreed or have been ordered to provide RIPH in more than half of the states in the country, and SBC has been ordered to provide it in Kansas and Missouri. Id. ¶ 41. This Commission should put this issue to rest once and for all in this proceeding by determining that SBC's refusal to provide RIPH means that it does not satisfy Section 271(c)(2)(B)(xi).

F. SBC Has Not Met Numerous Other Checklist Obligations.

SBC has failed to meet numerous other checklist obligations. Its SGAT and interconnection agreements contain a variety of restrictions or gaps that conflict with SBC's obligation to provide interconnection on a nondiscriminatory basis. Falcone/Turner Aff. ¶¶ 83-84. Physical collocation is not available on reasonable and nondiscriminatory terms. Id. ¶¶ 74-81. SBC has also offered no evidence that it is prepared to offer intraLATA toll dialing parity in Oklahoma in accordance with Section 271(e)(2)(A) and 47 C.F.R. § 51.213(a). Lancaster Aff. ¶¶ 53-59. Finally, SBC's Master Agreement governing access to rights-of-way is discriminatory both on its face and in light of various interpretations that SBC has set forth. Keating Aff. ¶¶ 5-29.

IV. SBC HAS NOT DEMONSTRATED THAT IT WILL CARRY OUT INTERLATA AUTHORIZATION IN ACCORDANCE WITH SECTION 272.

Section 271(d)(3)(B) requires the Commission to deny SWBT's application unless it finds that the "requested authorization will be carried out in accordance with the requirements of section 272 of this title." SBC's attempt to demonstrate compliance however, is completely deficient.

In both its application and its supporting affidavits, SBC's "evidence" consists almost entirely of promises that it "will" comply with the requirements of the Act and the Commission's rules once interLATA authority is granted.[17] SBC treats its current and past transactions conducted with its named Section 272 affiliate, SBLD, as largely irrelevant to this application. If that were true, however, then any BOC could evade the requirements of the Act and the Commission's rules altogether through otherwise prohibited transactions conducted prior to interLATA entry. Such a reading of the statute negates the requirement under Section 271(d)(3)(B) that the BOC make a showing that it will comply with Section 272.

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[17] See, e.g., SBC Br. at 44 ("SWBT and SBLD will comply with all of [the requirements of § 272(b)"); id. at 48 ("All such [joint marketing services] will be accounted for in accordance with all applicable affiliate transaction rules.") Affidavit of Karol Sweitzer On Behalf Of Southwestern Bell Long Distance ¶ D.2. ("SBLD and the SBC BOCs will operate independently"); id. ¶ H.2. ("upon commencement of the requested authorization, services or goods that the SBC BOCs provides to SBLD will be provided and accounted for in conformity with the FCC's then-effective rules"); Affidavit of Kathleen Larkin On Behalf Of Southwestern Bell Telephone Company, ¶ B ("SWBT will comply with the FCC accounting safeguards as promulgated").

The Commission's Non-Accounting Safeguards Order[18] makes clear that SBC's burden under Section 271(d)(3)(B) requires more than simple promises that SBC and SBLD will follow the law. In that Order, the Commission pointed to the "disclosure requirements" under Section 271(d)(3)(B) as a justification for declining to impose certain additional Section 272 reporting requirements for BOCs.[19] The review under Section 271(d)(3)(B), therefore, was anticipated to be vigorous and meaningful. Consequently, a BOC must be required to submit specific, tangible evidence showing both that it currently is ready and able to meet the requirements of Section 272,[20] and that the past and current transactions between the BOC and its Section 272 affiliate have been either in compliance with Section 272, or, if not in compliance, will not have any lingering anticompetitive effects once authority to provide interLATA service is granted.

SBC's submission falls woefully short of meeting its burden under Section 271(b)(3)(B). SBC and SBLD have identified at least 15 separate categories of transactions in which they have been involved, yet provide no detailed information concerning these transactions.[21] At the

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[18] *In the Matter of Implementation of Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, First Report and Order and Further Notice of Proposed Rulemaking (rel. Dec. 24, 1996) (Non-Accounting Safeguards Order).

[19] See Non-Accounting Safeguards Order ¶ 323.

[20] Such tangible evidence would need to show, for example, (i) that the BOC has detailed accounting procedures in place and operational so as to comply with the Accounting and Non-Accounting Safeguards Orders and with Section 272, (ii) that asset allocations required by the Accounting Safeguards Order have been fairly established, and (iii) that methods of evaluating transactions between SWBT and SBLD meet the Commission's guidelines (such as the derivation of the price to be charges by SWBT for marketing services it will provide to SBLD) and have been fairly and accurately established. See Crombie Aff. ¶ 13.

[21] E.g., Larkin Aff. ¶ E(2); Sweitzer Aff. ¶ D(2)(e).

same time, SBC and SBLD appear to acknowledge that certain of these transactions were not in full compliance with the requirements of Section 272 and the Commission's Orders, stating:

> In accordance with the Commission's regulations relating to operational independence and nondiscrimination, SWBT has undertaken to identify and discontinue the provision to SBLD of any services the Commission has determined to be impermissible or subject to a nondiscrimination requirement under the Act.

SBC Br. 47. Yet SBC and SBLD do not identify what services they have identified as being "impermissible," or provide a timetable as to when their "undertak[ing]" to discontinue such services will be completed. SBC's failure to provide vital information concerning the operations of SBLD and its transactions with SBLD preclude any finding at this time that SBC will comply with Section 272.

V. SBC CANNOT SHOW THAT ITS ENTRY INTO THE INTEREXCHANGE MARKET AT THIS TIME WOULD BE CONSISTENT WITH THE PUBLIC INTEREST, CONVENIENCE, AND NECESSITY.

Finally, SBC's application should be denied because SBC has not shown, and cannot show, that its interLATA authorization would be "consistent with the public interest, convenience, and necessity." See § 271(d)(3). Under current circumstances, SBC's interLATA entry would harm consumers in local and long distance markets alike. SBC's contrary arguments lack merit.[22]

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[22] SBC maintains that BOC entry into the interexchange market is presumptively in the public interest. This startling proposition flatly contradicts the central premise underlying the MFJ and preserved in the Act that integration of the BOCs' local exchange monopolies with interexchange service was anticompetitive and contrary to the public interest. While the 1996 Act creates mechanisms and incentives to break up the BOCs' local monopolies in the future and then to permit BOC entry into long distance, there is nothing in the language of Section 271 which even remotely suggests that -- upon passage of the Act -- BOC reintegration is presumptively and immediately in the public interest. See § 271(d)(3)(C)

(continued...)

A. The State Of Local Competition Must Be Examined When Making The Public Interest Determination.

As SBC acknowledges (Br. at 52), the ultimate inquiry under the Section 271 "public interest" test must be whether SBC's entry into the interexchange market will promote competition. Having correctly identified the core question, however, SBC attempts to obscure the answer by labeling "off limits" any inquiry into the state of local competition. SBC Br. at 55. This contention is baseless.

First and foremost, the plain language of Section 271 directs the Commission to determine, in consultation with the Department of Justice, whether "the requested authorization is consistent with the public interest, convenience, and necessity." § 271(d)(3)(C). It is settled law that the impact on competition must be considered as part of the inquiry. See Denver & Rio Grande Western R.R. Co. v. United States, 387 U.S. 485, 492 (1967) ("public interest" test is "broad statutory standard[]" requiring "consideration of all important consequences including anticompetitive effects").[23] Indeed, given that the BOCs' ability to leverage their local service and exchange access monopolies lies at the heart of the ongoing interLATA restriction, it would

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[22] (...continued)
("The Commission shall not approve the authorization . . unless it finds that . . . the requested authorization is consistent with the public interest, convenience, and necessity") (emphasis added).

[23] See also United States v. FCC, 652 F.2d 72, 88 (D.C. Cir. 1980) ("we have insisted that the agencies consider antitrust policy as an important part of their public interest calculus"); OTI Corp., 6 FCC Rcd 1611, 1612 (1991) ("the Commission is required to consider anticompetitive consequences as one part of its public interest calculus"); Telemarketing Communications of South Central Indiana, Inc., 5 FCC Rcd 7712, 7712 (1990) (the Commission is required to consider whether proposed transaction "will inhibit competition and thereby be detrimental to the public interest"); Western Union Corp., 3 FCC Rcd 6792, 6794 (1988) ("the Commission is required to consider anticompetitive effects as one part of its public interest finding").

be absurd to lift the interLATA quarantine without first determining whether the condition that necessitated the quarantine persists.

Nor does Section 271 anywhere provide that consideration of local competition under the public interest test improperly "extends" the competitive checklist. See § 271(d)(4). While the checklist specifies the minimum terms that BOCs must provide, the public interest test assures that BOC entry will not occur so long as it would generate anticompetitive effects in telecommunications markets. Provided the Commission does not adopt a rigid requirement as to additional terms BOCs must offer in every State, it will not be adding to the checklist -- any more than Congress did when it added a separate public interest requirement.

Second, SBC's effort to screen local competition from the public interest analysis is flatly belied by the legislative history of the Act. Making selective use of this history, SBC argues that "satisfaction of these [competitive checklist] requirements, and only these requirements [is] the appropriate threshold test for full Bell company entry into long distance markets." SBC Br. at 56. SBC, however, omits mention of the most directly pertinent legislative history: During deliberations over the Act, the Senate tabled -- by a vote of 68 to 31 -- an amendment that would have adopted SBC's position by providing that "[f]ull implementation of the [competitive] checklist . . . shall be deemed in full satisfaction of the public interest, convenience, and necessity requirement." 141 Cong. Rec. S7960, S7971 (daily ed. June 8, 1995).[24] Congress's deliberate decision to keep the "public interest" test as a separate and independent requirement

[24] The Conference Committee adopted this provision from the Senate Bill. See Conf. Rep. p. 149.

establishes that satisfaction of the checklist cannot be deemed sufficient by itself to justify BOC long distance entry.[25]

B. The Absence of Competition in Oklahoma Local Exchange Markets Demonstrates That SBC's Entry Into The Interexchange Market Would Be Inconsistent With the Public Interest, Convenience, And Necessity.

1. There is No Effective Competition in The Local Exchange Market.

As the FCC recently recognized, the local exchange market remains "one of the last monopoly bottleneck strongholds in telecommunications." Non-Accounting Safeguards Order, ¶ 205. Oklahoma's local exchange market, which is completely dominated by SBC, is no exception. SBC's share of the Oklahoma local exchange market exceeds 99%. Hubbard/Lehr Aff. p. 32. As this overwhelming market share vividly illustrates, at the present time, there are no facilities-based providers, resellers, or wireless providers that are capable of constraining SBC's ability or incentive to engage in anticompetitive behavior. See id. pp. 31-37; Turner Aff. ¶¶ 25-29.

In maintaining that local markets are now open to competition, SBC relies upon the number of certified CLECs in Oklahoma; the number of arbitration agreements it has completed; the plans of AT&T, Sprint and MCI to provide extensive local service in the future; and the

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[25] In addition, Congress expressly concluded that the MFJ's section VIII(C) test -- "whether there is no substantial possibility that the BOC or its affiliates could use monopoly power to impede competition in the market such company seeks to enter" -- would be an appropriate standard for the Attorney General, and thus the FCC, to employ in evaluating a BOC's application. See Conf. Rep., p. 149. The MFJ court consistently construed the VIII(C) standard to require an examination of the competitive conditions in the BOC's local market in order to assess whether the BOC continued to enjoy a bottleneck monopoly power that could be leveraged into market power in the market the BOC sought to enter. See, e.g., United States v. Western Elec. Co., 673 F. Supp. 525 (D.D.C. 1987), aff'd on this ground, 900 F.2d 283 (D.C. Cir. 1990), cert. denied, MCI Communications Corp. v. U.S., 498 U.S. 911 (1990).

assertion that competing carriers are "well-positioned" to compete in the local exchange market. This reliance on future local exchange competition to gain entry now into long distance service conflicts with both law and sound economic principles. One of the principal goals of the Act is to create competition in local exchange markets. But the Act nowhere provides that the promise of such competition alone constitutes a basis for authorizing BOC entry into in-region interLATA services. Indeed, the strict requirements of Section 271 belie any such suggestion. Moreover, the economic reality is that potential competition will not act as an effective competitive constraint so long as there are entry barriers into the relevant market. Baumol Aff. ¶ 23-32. There clearly remain barriers today in the Oklahoma local exchange market (see Hubbard/Lehr Aff. pp. 37-42; Baumol Aff. ¶¶ 26-32), as reflected in the current absence of competition in those markets.

Furthermore, it is, at best, uncertain when effective competition will emerge in Oklahoma local exchange markets, in light of SBC's own efforts to stymie the growth of local competition. For example, SBC is supporting legislation in Oklahoma that would directly undermine the Communications Act's goal of opening local exchange and access to competition.[26] Furthermore, SBC has engaged in egregious dilatory tactics in its negotiations with potential entrants into local telecommunications markets. See Wren Aff. ¶¶ 20-34. The best evidence of the uncertain state of future competition, however, is the current state of competition in Oklahoma. SBC heralds the efficacy of the Act's unbundling provisions and current state and

[26] See Wren Aff. ¶ 50. SBC has already succeeded in getting such legislation passed in Texas and Arkansas. The anticompetitive flavor of these laws is exemplified by provisions such as one in the Texas law which precludes AT&T, MCI and Sprint from entering the local exchange market as pure resellers. Id.

federal regulations as fully adequate to assure the explosion of vigorous local competition. This bold pronouncement is unsupported by evidence of any significant actual competition today.

2. SBC's Premature Entry Into The Interexchange Market Would Provide SBC Incentive And Opportunity To Harm Competition.

Premature entry would eliminate the strong incentive SBC otherwise has under Section 271 to cooperate in opening Oklahoma local exchange markets to competition.[27] Local competition will emerge only if SBC genuinely cooperates with potential rivals in the development of the complex technical arrangements, such as OSS, that are required by the Act. Once SBC is granted interLATA authority, however, its overriding incentive will be to impede the development of local competition, both to protect the monopoly revenues it enjoys from local exchange and exchange access services, and to maintain its anticompetitive advantages over other carriers that would otherwise seek to provide bundles of local and long distance services in competition with it. Hubbard/Lehr Aff. pp. 56-65.

Granting SBC's application now would therefore immediately create a second monopoly in addition to SBC's current monopoly over local exchange service -- a monopoly over the provision of bundled packages consisting of SBC's local service and long distance service (which SBC could buy at what amounts to discounts of 55-70% below the highest retail rates and resell). Because SBC has not yet complied with the competitive checklist and meaningful entry into the local markets is not yet feasible, SBC would be the only carrier with the opportunity to offer end-to-end service in significant volumes, and would be able to foreclose competition for the subscribers that would find that offering attractive. Hubbard/Lehr Aff. pp. 78-79.

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[27] In the Matter of Petition for Declaratory Ruling Regarding US West Petitions to Consolidate LATAs in Minnesota and Arizona, DA97-767, ¶¶ 25, 28 (Rel. April 21, 1997).

SBC also could harm long distance competition in numerous ways. It could, for example, engage in a classic price squeeze against its long distance competitors merely by continuing to impose inflated charges for non-competitive exchange access. Hubbard/Lehr Aff. pp. 58-59; Baumol Aff. ¶¶ 14, 41.

If unconstrained by competition, SBC also could use local exchange revenues to subsidize its long distance business. Through a variety of means, it could mischaracterize costs of providing long distance services as local exchange costs, recover those costs from monopoly ratepayers, and thus price its long distance service below cost with no loss to itself -- thereby harming consumers in both the local market and the long distance market. Hubbard/Lehr Aff. pp. 60-61. Price caps cannot prevent such an anticompetitive cost misallocation, because whenever a price cap is set or modified to reflect new technology, the regulator must take account of the BOC's costs to arrive at a cap that covers costs and allows a reasonable rate of return. In establishing these costs, the BOC has the same incentive and opportunity to shift costs from long-distance service to local service that it has under traditional rate of return regulation.

SBC would also have powerful incentives to discriminate in the pricing and provisioning of monopoly exchange access services to its "captive" long distance competitors, so as to raise their costs and degrade the quality of their service. Hubbard/Lehr Aff. ¶¶ 38-50; Baumol Aff. ¶¶ 36-47. Such discrimination would allow SBC both to expand its share of the long distance market by disadvantaging carriers that provide "stand alone" long distance service, and to protect its local market and customer base from competitors seeking to provide bundled long distance and local services. See Notice of Proposed Rulemaking, Non-Accounting Safeguards, ¶ 139 (rel. July 18, 1996) ("To the extent customers value 'one-stop shopping,' degrading a carrier's

interexchange service may also undermine the attractiveness of the carrier's interexchange/local exchange package and thereby strengthen the BOCs' dominant position in the provision of local exchange service.").

SBC's anticompetitive conduct would be exceptionally "difficult to police, particularly in situations where the level of the BOC's 'cooperation' with unaffiliated . . . carriers is difficult to quantify." Id.; see also Hubbard/Lehr Aff. p. 45; Allen/Gropper Aff. ¶¶ 15, 51-53. SBC witnesses Kahn and Tardiff claim that discrimination would be a virtual impossibility because it would require conduct that would be "sufficiently detectable by customers to induce them to shift their patronage while going undetected by sophisticated competitors and regulators." Kahn/Tardiff Aff. ¶ 37. Such rhetoric entirely misses the central point about the limitations of regulation and competitor vigilance: The problem confronting regulators and competitors is not that discrimination would be difficult to observe. The problem, rather, is that it is extremely costly and nearly impossible to prove that cross-subsidies, cost shifting or service degradation is the product of anticompetitive discrimination rather than justifiable business practice. Hubbard/Lehr Aff. p. 45; Baumol Aff. ¶ 42; Allen/Gropper Aff. ¶¶ 34-35, 59.

In sum, for so long as SBC's competitors remain critically dependent upon access and interconnection to SBC's network, SBC can engage in numerous forms of discrimination that cannot be forestalled by regulation. It therefore cannot be in the public interest to admit SBC into the long distance market until the local market is effectively competitive.

C. Because The Interexchange Market Is Already Vigorously Competitive, SBC's Claims of Likely Consumer Benefits From Its Entry Are Baseless.

SBC maintains that the long distance market today is insufficiently competitive, and therefore that its entry into the market will have a substantial competitive impact. Preliminarily,

it is quite remarkable that SBC could suggest that the local markets in which it retains greater than 99% market share are competitive, while asserting that the long distance market in which numerous facilities-based and non-facilities based carriers fight openly over customers is not competitive. No single standard could possibly generate both conclusions.

In all events, both conclusions are false. As discussed above, SBC retains monopoly control of the Oklahoma local exchange market. In sharp contrast, the long distance market exhibits the hallmarks of a vigorously competitive market: hundreds of new entrants; declining market share of the formerly dominant carrier AT&T; excess capacity; a high rate of customer churn; and falling prices.

The long distance market today is characterized by intense rivalry among several hundred aggressive competitors. Hubbard/Lehr Aff. pp. 15-31. Moreover, since divestiture, AT&T's share of toll revenue dropped from 87.7% in the fourth quarter of 1984 to 53.8% by the fourth quarter of 1996 -- an average decline of nearly 3% per year. Federal Communications Commission, Long Distance Market Share, Fourth Quarter 1996, Industry Analysis Division, Common Carrier Bureau, March 1997, Table 6. Furthermore, AT&T's losses were not just MCI and Sprint's gains. More than three quarters of AT&T's losses between the fourth quarter of 1990 and the fourth quarter of 1996 were to the hundreds of smaller interexchange carriers: As AT&T's share of revenues fell by 12.7% during this period, MCI's share increased by only 2.6%, and Sprint's share fell by 0.2%. Id. At the same time, WorldCom's share of revenues grew from 0.3% to 5.1%, and the share of the remaining carriers grew from 9% to 15.4%. Id. It is simply preposterous to suggest that these hundreds of firms, widely differentiated by size and geographic scope, could tacitly collude or engage in oligopolistic forbearance.

The competitive significance of the hundreds of interexchange firms is heightened by the long distance market's wide-spread excess capacity. Excess capacity fosters competitive pricing, because where competitors can readily expand output to meet customer demand, the market power of a firm contemplating an anticompetitive price increase is muted. See United States Department of Justice, Horizontal Merger Guidelines § 2.22 (1992). There is so much spare fiber optic capacity in the interexchange industry that AT&T's competitors could absorb one-third of AT&T's capacity within three months simply by using spare switch ports and existing transport facilities. Motion of AT&T to be Reclassified as a Non-Dominant Carrier, 11 FCC Rcd. 3271, 3303-04 (1995) ("Non-Dominance Order"). As the FCC has concluded, "AT&T's competitors have enough readily available excess capacity to constrain AT&T's pricing behavior -- i.e., that they have or could quickly acquire the capacity to take away enough business from AT&T to make unilateral price increases by AT&T unprofitable." Id. at 3303.

The intensity of competition in the long distance market is also evidenced by the frequency with which customers switch carriers. For example, in 1995, following a steady barrage of price-based advertising and promotion, over 42 million long distance subscribers changed carriers. Hubbard/Lehr Aff. ¶ p. 31. This pronounced willingness and ability of consumers to switch long distance carriers is patently incompatible with the specious claim that the long distance market is not subject to effective competition.

Finally, the declining price of interexchange service since divestiture is perhaps the most stark evidence of competition. Since the MFJ, long distance prices have plummeted 60% in real terms, and 37% net of access. Hubbard/Lehr Aff. pp. 22-23. The decline in prices has not been limited to the highest volume callers. To the contrary, as the FCC has found, the "average

best price" for all categories of residential customers divided by calling volume fell from 1991 to 1995. Non-Dominance Order, 11 FCC Rcd. at 3363 (Appendix A, Table 1).[28]

Thus, after an objective examination of the relevant determinants of market power, there can be no tenable claim that the long distance market is non-competitive. In contending otherwise, SBC and its experts rely principally on assertions that AT&T's rates have risen relative to costs, and notwithstanding significant reductions in access charges. See SBC Br. 47-62; Kahn Aff. ¶¶ 12-16. Those claims are false. They directly conflict with the Commission's findings, and they ignore the data that conclusively show that rates paid by consumers have declined more than access charge reductions precisely because of the intense competition in that market. Hubbard/Lehr Aff. pp. 22-24, 70-75.

SBC's contention that price-cost margins have been rising and converging relies heavily upon Professor MacAvoy's putative calculations of these margins. SBC Br. 59-61. His calculations twice before have been submitted to the Commission by BOCs and found to be "inconclusive." See Second Report and Order, Policy and Rules Concerning the Interstate, Interexchange Marketplace, ¶123, CC Docket No. 96-61 (rel. Oct. 31, 1996); Non-Dominance Order, 11 FCC Rcd. at 3314. Throughout the years in which he has unsuccessfully pressed his analysis, Professor MacAvoy has consistently refused to provide his underlying data and programs, and therefore it is impossible to replicate his work. Hubbard/Lehr Aff. p. 74. Even without his data, however, it is clear that his work founders on both factual and theoretical levels. Professor MacAvoy's putative "prices" far exceed what long distance customers actually

[28] The FCC's data showed a slight increase in nominal terms for the customers with the smallest calling volumes, but even that segment experienced a decline in real terms.